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No. 84-1484

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS; WISCONSIN DEPARTMENT OF ADMINISTRATION; STATE BUREAU OF PROCUREMENT; SECRETARY, WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS; DIRECTOR, STATE BUREAU OF PROCUREMENT, WISCONSIN DEPARTMENT OF ADMINISTRATION; JAN RICHARDSON; AND GARY C. SHEALY,

Appellants,

v.

GOULD INC., a Delaware Corporation,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOINT APPENDIX

COUNSEL OF RECORD LISTED ON INSIDE COVER

APPEAL WAS DOCKETED MARCH 8, 1985
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BRONSON C. LA FOLLETTE
Attorney General

CHARLES D. HOORNSTRA
Assistant Attorney
General of Wisconsin
Counsel of Record
P. O. Box 7837
Madison, Wisconsin 53707
(608) 266-9945
Attorneys for Appellants

GEORGE B. CHRISTENSEN
COLUMBUS R. GANGEMI, JR.
Counsel of record
GERALD C. PETERSON
Winston & Strawn
One First National Plaza
Suite 5000
Chicago, Illinois 60603
(312) 558-5600
Attorneys for Appellee

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WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS; WISCONSIN DEPARTMENT OF ADMINISTRATION; STATE BUREAU OF PROCUREMENT; SECRETARY, WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS; DIRECTOR, STATE BUREAU OF PROCUREMENT, WISCONSIN DEPARTMENT OF ADMINISTRATION; JAN RICHARDSON; AND GARY C. SHEALY,

Appellants,

v.

GOULD, INC., a Delaware Corporation,

Appellee.

RELEVANT DOCKET ENTRIES
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Date	Nr	Proceedings
2/2/83	1	Complaint
2/3/83	2	Motion by plaintiff for prelim injunction
2/3/83		Summons issued

Date	Nr	Proceedings
2/15/83	4	Notice of filing
2/18/83		Hrg. on mo for P.I. *** Motion granted
2/18/83	10	Order granting mo for P.I. Cys. mld.
2/18/83	11	Notice of mo for P.I.
2/23/83	13	Defts' ANSWER.
4/18/83	14	Transcript on Hrg on PI on 2/18/83
4/27/83	15	Deft's PPTC Report
5/5/83	16	PTC Order (WLG)
6/8/83	17	Pltf's mo for SJ
6/8/83	19	Deft's mo for SJ
12/21/83	28	Order permanently enjoining defts. cc. mld.
1/17/84	29	NOTICE OF APPEAL by defts.
1/20/84		Shrt. record mld. cc counsel.

DOCKET ENTRIES
IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Dated	Proceeding
9/17/84	Oral argument
12/13/84	Opinion
12/13/84	Judgment

PRELIMINARY INJUNCTION OF
FEBRUARY 18, 1983, IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

This matter being heard on plaintiff's Motion for Preliminary Injunction on February 18, 1983 and this Court being duly apprised of the premises:

NOW THEREFORE IT IS ORDERED that plaintiff's motion for preliminary injunction is granted and defendants are hereby ordered:

1. To honor plaintiff's existing contracts with the State of Wisconsin and its departments and subdivisions (the "State");

2. To accept and grant plaintiff's bids to provide goods and services to the State;

3. To cease publishing and circulating a "Notice to Bidders" listing plaintiff as a "Labor Law Violator";

4. To advise all bidders who have received a copy of the "Notice To Bidders" that Gould is in no

way restricted from doing business with the State;

5. To advise all state purchasing agencies that Gould is in no way restricted from doing business with the State.

. . .

TRANSCRIPT OF PROCEEDINGS
OF FEBRUARY 18, 1983

[3](Whereupon said proceedings in the above-entitled civil action were commenced in open court as follows:)

CLERK NELSON: 83-C-104, Gould, Inc. versus Wisconsin Department of Industry, called for Hearing on Preliminary Injunction.

May we have the appearances, please.

MR. J. DAVID RICE: Your Honor, the plaintiff appears by local counsel, Rice & Abbott, J. David Rice.

And I would like to move, at this time, the admission of Gerald Peterson to the bar of this court for the purpose of

conducting this hearing. He is a member of the State Bar of Illinois and a member of the firm of Winston & Strawn, which of counsel in this action.

THE COURT: Thank you, Mr. Rice.

The motion is granted.

MR. PETERSON: Thank you, Your Honor.

MR. DAVID RICE: The defendants appear in the action by David C. Rice, Assistant Attorney General.

THE COURT: Thank you.

MR PETERSON: Your Honor, in filing our [4]Motion for Preliminary Injunction and the exhibits thereto, we neglected to file the affidavit of Mr. Robert L. Neylan, who is Gould's Vice President of Employment Relations. This affidavit was filed with the state in the State Administrative Proceedings.

I have discussed this matter with Mr. Rice for the defendants, and he has no objections to our attaching that as an exhibit to our motion.

THE COURT: That's right, Mr. Rice?

MR. DAVID RICE: Yes.

THE COURT: All right.

MR. PETERSON: In addition, Your Honor, it has come to our attention since the filing of this motion that the State of Wisconsin or that the University of Wisconsin is building or about to open a new veterinarian school; and that it will be letting bids on certain instruments which will be needed in that matter.

The bids, it's our understanding, will be let very shortly and that under their normal practice and procedure, the contracts will be awarded within 30 days of the letting of the bid.

We do have Mr. Howard Boyle here, present here, who can testify on the harm that will be done to Gould if this injunction is not granted.

THE COURT: All right. Besides him, Mr. [5]Peterson, is there anyone else that you were planning to elicit testimony from, or were you prepared to just argue the law?

MR. PETERSON: I think we were prepared to argue the law. Mr. Boyle was the only witness.

THE COURT: All right.

Mr. Rice, do you want to have Mr. Boyle put on the stand or would you be prepared to stipulate that there may well be and are bidding opportunities for Gould at this time that Gould may be precluded from obtaining because of this particular listing?

MR. DAVID RICE: Your Honor, I would have no problem agreeing to what you have just stated. I am not personally familiar with the specifics of that particular bid, but I would agree with what you just said.

THE COURT: The reason I ask is that you seem to have made a point in your brief of arguing a lack of need for a Preliminary Injunction regardless of the merits of the issue.

And if that particular aspect is going to be a point that you're going to emphasize in your argument, I think that I want to allow plaintiff a chance to get that on the record in a definite and concise fashion so it is not an issue.

MR. DAVID RICE: Your Honor, although I [6]signed the brief that's been filed on behalf of the defendants, I was not the author of the brief; and I

might take a different perspective in terms of my approach to the case.

But in any event, in my argument today all I had planned on arguing was the constitutional issues themselves. And I do not intend to make any argument on the question of harm.

THE COURT: All right. Then for the record it is agreed between counsel that there are bidding opportunities presently available for Gould in the State of Wisconsin for State of Wisconsin contracts and for products that Gould manufactures and that Gould will be precluded from delivering--I guess I should stop because I'm not sure whether Gould is just out of the bidding process all together or whether it's in the bidding process but not allowed to be awarded the bid.

In any event, whether it's not allowed to bid or whether it's not allowed to obtain the award of the bid, the result is the same that Gould will not be able to win any of these bids because it is presently listed as a labor law violator, and that this is harm that Gould will suffer if the present law is upheld.

Would you agree to that or do you wish to refine it in any way?

[7]MR. DAVID RICE: No, I would agree to that.

THE COURT: Okay.

All right then, counsel, I'll hear you on the merits of the argument itself, the law.

MR. PETERSON: Thank you Your Honor.

THE COURT: Mr. Peterson, you may sit or stand as you wish. If you would like to, perhaps pull that lecturn podium

thing over, you could stand in a way that the people who are here in the courtroom would have a good chance to hearing you.

MR. PETERSON: Thank you, Your Honor.

May it please the Court: Counsel, Your Honor. In this case the defendants do not challenge any of the facts asserted by Plaintiff Gould, that is, plaintiff has had contracts with the State of Wisconsin, plaintiff is authorized or was authorized to bid on contracts in the State of Wisconsin, that the defendants advised plaintiff on August 25th, 1982 that because the plaintiff had sought judicial review of various National Labor Relations Board decisions and lost on appeal, Gould could no longer do business with the State of Wisconsin.

Plaintiff's explanation for their conduct is that the Wisconsin Labor Law Violator's List simply [8]encourages obedience to law as federally adjudicated. This statement, Your Honor, is found in defendants' brief at Page 15. The explanation given by the defendants for their conduct or the reason fully establishes the unconstitutionality of the statutes and defendants' conduct thereunder.

Unquestionably, Your Honor, the statutes are preempted by the National Labor Relations Act and are, thus, unconstitutional under the Supremacy Clause of the Constitution.

The test for preemption is set forth by the Supreme Court in Perez v. Campbell, 402 U.S. 637, 649 and the case is cited therein, a 1970 decision. And that test is as follows:

The test for preemption is whether a challenged state statute stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

With regards to the National Labor Relations Act, direction and appropriateness was to establish industrial peace, uniform national development of Section VII, Rights of Workers, as those rights are defined by the National Labor Relations Board and the United States Courts of Appeals, including the United States Supreme Court.

[9]Indeed, Congress, in implementing the National Labor Relations Act, established that the federal courts, courts of appeals, are given superior authority over the National Labor Relations Board to determine what the

federal labor law policy is in keeping with the National Labor Relations Act.

The statutes, the Wisconsin Labor Law Violator's List statutes in truth and defendants' actions taken thereunder intrude upon congressional policy by penalizing only those employers who challenge various decisions of the National Labor Relations Board.

Under the statute only an employer could violate the National Labor Relations Act thousands of times so long as it acquiesced in the Board's decision. But if the employer, in good faith, believed that the National Labor Relations Board was wrong and sought judicial review either by requiring the National Labor Relations Board to enforce its act, to enforce its decision, or by petitioning the Court for review itself, if that employer took that action, it is

at risk of being debarred by the State of Wisconsin.

THE COURT: Well, is that really a likely situation? I mean, is it likely that an employer is going to sit by and not appeal when it thinks it has been unfairly found in violation by the NRLB?

[10]MR. PETERSON: Well, Your Honor, from a simple statement, yes. Here we have an employer, for example, Gould, which does well over $250,000 worth of business in the State of Wisconsin.

It must weigh not only the fact that on appeal it stands a chance of losing, but it must weigh not only its chances of winning, vis-a-vis whether or not it owes an employee back pay or what its labor contract means. It now must weigh that as a business decision whether or not, if unsuccessful on appeal, it will lose business.

So that is a real choice that employers are now forced with making, are forced to make that they were not forced to make before. It is a risk which is added to their right to appeal. If they do not appeal, they run no risk of losing business with the state.

THE COURT: Well, let's talk about the real world. I would suspect with a company the size of Gould that some of the decisions by the NRLB, we're talking about a lot more than $250,000 being at stake.

For example, if the NLRB were to find that there had been some sort of inequitable treatment in pay for separate jobs, we might be talking about millions of dollars.

[11]I mean, are you suggesting that most--in terms of what you're arguing, which is real and an actual deterrent to

appealing, how real is a quarter of a million dollars versus some of the sizes of--the cost of repairing some of the conditions that have led to the violations?

MR. PETERSON: Well, for example, Your Honor, the normal type of case would be a discharge of one worker where the National Labor Relations Board has alleged it was on account of that worker's union activities because that person was a union member.

That case, in terms of money value, back pay, by the time it gets to the National Labor Relations Board, would it be about two years' salary. Maybe $20,000 minus lawful deductions and plus interest, of course. So that's a $20,000 case in terms of cost to the employer.

He may wish to appeal that decision because, as is often the case, the

National Labor Relations Board has applied the wrong test, that is, the employer in fact had a very good reason for discharging the employee.

But now he must weigh whether or not he is going to assert his right to manage is facility as he feels he is entitled to under federal law, or [12]whether he can risk that $20,000 judgment against a loss of, in this case, $250,000 worth of business.

And the types of cases that Gould has appealed, which form the basis for the State's decision to debar Gould, we have a case where Gould was required by law to commit an unfair labor practice in order to obtain judicial review of the Board's decision. This was an election certification case.

The only way that Gould could determine whether or not that union

properly represented its employees was to challenge the Board's decision on the certification by refusing to bargain with the union because federal courts do not have jurisdiction over the National Labor Relations Board decision to certify a union in an election.

So, Gould was required, by federal law, in order to determine whether or not the Board acted properly, to refuse to bargain with that union. There was no showing at all, nor was there any statement in that case, that Gould was acting out of anti-union animus. Rather, Gould was simply to determine whether or not that union in fact properly represented its employees. In that type of case we are again dealing with a situation where an employer in our case, say it is 250,000, but another employer it might be more, is going to weigh,

[13]do I run the risk of beng found guilty of a violation of the National Labor Relations Act and lose business or do I let my union employees be represented by a union which is not properly certified for them.

THE COURT: Mr. Peterson, would it be fair to say that your argument on this alleged interference with appeal rights has two aspects to it?

First of all, there's some sort of due process argument that it is improper for the government to interfere with access to the courts, including appellate rights; and, secondly, that it is related to the scheme encompassed by the National Labor Relations Act which includes the right to appeal from the decisions of the NRLB?

MR. PETERSON: That is correct, Your Honor, with one addition.

It is also, we believe, a violation of the equal protection aspects of the Fourteenth Amendment, that is, to place a burden on persons solely because they appeal is in fact a violation of the Equal Protection Provision --

THE COURT: I think that's one of your weaker arguments, so I wasn't going to deal a lot with that.

What kind of infringements can a state [14]constitutionally place on somebody's exercise of appellate rights or trial rights?

In the criminal law area there are situations, for example, where someone is charged with a crime for which the penalty is death. And in some states they have an arrangement in which a person charged for a crime for which the penalty is death can only be sentenced to death by a jury.

Now the Supreme Court has said that the fact that the right to trial by jury is burdened by this extra penalty which could not be imposed if the person went to trial by a judge only, is not such a burden as to make that particular choice an unconstitutional one to impose upon a defendant.

The point is, there are burdens that you can place upon exercise of certain rights related to trial and appeal. What is too much and what is not too much?

MR. PETERSON: Well, Your Honor, with regard to the National Labor Relations Act, we would take the position that any imposition on the Section VII rights of the employees or the Section VIII obligations of the employer, the State has no business in that particular area of the law, the National Labor Relations Act.

[15]Insofar as the rights of appeal, I believe in Lindsey v. Normet, the state had imposed a penalty on tenants who appealed eviction notices and the penalty was double the rent. If they lost the appeal, they were required to forfeit double the rent; while if they did not appeal, then they were, of course, only obligated to pay normal rent.

And the Supreme Court in that case held that that was an unfair imposition on the tenant's right to appeal his eviction. The fact that he was now at a risk that but for his appeal he would not be at risk at all was the unconstitutional burden.

So to the extent that in a criminal or other civil setting where the state has, of course, absolute control, the state may not, once it has established the appeal right, it may not burden that

right unnecessarily. It may not require an appellate to do things that he would not otherwise have to do based upon the judgment blow. It can't penalize him solely because he appealed.

And that's what the State of Wisconsin has done with regards to the federal statute in this case. Where Congress has set a federal statute in federal framework, then the State must take care that their actions do not impinge upon that federal framework.

[16]For example, if the State of Wisconsin were to pass a law saying that it would not purchase any goods from any employer who allowed women to work overtime because the State of Wisconsin believes women should not be allowed to work overtime, that, of course, flies in the case of Title VII; and it would be

preempted by Title VII under the Supremacy Clause.

It impinges on the grant of a federal right. Or in the case of an employer under the National Labor Relations Acts, it impinges upon his obligations.

Again, Garmon is another example. Garmon establishes, under the preemption doctrine, that where the National Labor Relations Board is active, the states are ousted of all jurisdiction. Garmon made it clear that a state cannot punish, reward or interfere with conduct solely because that conduct may or may not violate the National Labor Relations Act.

So, where the conduct is being punished, reward or interferred with by the state solely because that conduct is violative or protected by the National Labor Relations Act, the state may not

act at all. Only where the state's interest is peripheral to the National Labor Relations Act and not conditioned upon whether or not the employer or employee is asserting rights established thereunder, may it act.

[17]For example, in Farmer v. Carpenter, the employee sued the union for unlawful discrimination in other activities as well as tortious interference with the contract, with his right to contract with his employer.

The Supreme Court stated that although we recognized the state tortious interference, that state tort may not be based upon the union's alleged unfair labor. It must be separated from the union's alleged unfair labor practice or the state or that statute or the state law would be preempted.

THE COURT: This would be a lot easier case, wouldn't you agree, if the State of Wisconsin said we aren't going to contract with employers who refuse to bargain with a duly-certified union?

MR. PETERSON: I'm sorry?

THE COURT: All right. The State of Wisconsin said, we're not going to contract with employers who refuse to bargain with a duly-certified union.

I think this would be clearly unconstitutional because the state would be inserting itself at the level that the NLRB is clearly solely responsible for, that is, what are the penalties that accrue to an employer who fails to bargain with a union that has been duly-certified by the NLRB.

[18]This scheme is this happens, this happens and this happens, and one of the things that can happen is that the

employer fails to bargain, that the NLRB can seek an enforcement against the employer.

MR. PETERSON: That is correct.

THE COURT: Okay.

MR. PETERSON: I believe that that statute would be just as unconstitutional as this statute.

THE COURT: All right.

MR. PETERSON: I don't think you want to say it's easier.

THE COURT: But it is clearly the state would be inserting itself into this scheme and adding the permits that would be imposed upon an employer for violations of the federal act.

MR. PETERSON: That is correct.

THE COURT: Okay. What makes this case, I think, more difficult, understanding the same, is that we're talking

about a situation which is several steps removed.

We have the employer who, let's say, just for illustration, refuses to bargain with a duly-certified union in order to get judicial review of the certification decision and is, in the process, charged with a labor violation.

[19]And the appellate procedure goes forward and the employer is found to be in the wrong.

MR. PETERSON: That's correct.

THE COURT: There has been an adjudication that the employer's just flat wrong about the view of the validity of the certification.

Then the employer goes on and does a number of other things, including two other things which are found to be violations of the National Labor Relations Act; and the same sort of

procedure is followed and the employer's now in violation three times.

The defendants argue that nothing about what the state does at that point is interfering with the operation of this federal scheme because it comes afterwards and relates really to a status that the employer has rather than either penalizing him at that point for additional acts or deferring him from further bad acts, and that it is peripheral to the whole federal scheme and for that reason is not preempted by the National Labor Relations Act.

MR. PETERSON: Well, Your Honor, the answer to that, I think, is, one, the statutory scheme of the act itself which impinges upon the employer's statutory, as well as other constitutional right to appeal, asserts agency decision.

[20]But aside from that, getting to the point of the employer's obligations under the Act, Congress set forth the fact that the National Labor Relations Act is remedial, not punitive in nature. Once the National Labor Relations Board has acted and it is enforced by the court, the federal court enforces the remedy imposed by the National Labor Relations Board.

Therefore, at the time the employer must comply with the decision of the National Labor Relations Board and must implement the order of the National Labor Relations Board. Therefore, once the employer has implemented the order of the National Labor Relations Board, it is no longer in the status of a labor law violator. It has complied with the actions required of it by the National Labor Relations Board to remove itself

from the category of a labor law violator.

The only thing that the State of Wisconsin does is punish someone for having violated the act and then remedied the situation. Because if the employer did not remedy the violation, the federal courts certainly have contempt powers. They may throw the employer in jail until he cures his contempt.

The National Labor Relations Board has extraordinary remedies which it may impose, and those extraordinary remedies will be enforced by the Courts [21]of Appeals.

For example, where an employer has been particularly egregious in his unfair labor practices, the National Labor Relations Board may, despite the fact that a union lost the election, require that employer to recognize and bargain

with that union with regards to wage terms and other conditions of employment.

That order is enforceable by the United States Courts of Appeals; and, of course, the penalty for violating the order of the United State Court of Appeals is contempt.

So the State of Wisconsin adds nothing to this. It only impinges upon it by adding a remedy--not a remedy, but a punishment which Congress specifically refused to allow the National Labor Relations Board.

And in Garmon the Supreme Court pointed out that what the state is doing is attempting to regulate conduct which is regulated right now by the federal government. As a matter of fact, in their brief that's what defendants state they are doing. The purpose of this law is to compel obedience -- I'm sorry. I

want to quote it correctly. Is to encourage obedience to laws federally adjudicated.

Well, as I pointed out, Your Honor, I believe that the federal courts are quite capable of [22]making sure that their orders are obeyed without the help of defendants.

And again, Your Honor, assuming that the state has a legitimate interest in enforcing orders for the Courts of Appeals and requiring obedience to the law, or that it has a legitimate interest in refusing to purchase from labor law violators, defendants' conduct in the statutes herein are not rationally related to that interest.

The defendants are not concerned with the number or type of National Labor Relations Board violations. As set forth in their decision which was attached to

our motion, they don't care whether or not the violation was technical or egregious or how egregious or whatever. It's only if it's been enforced by a Court of Appeals. They don't care how many times the employer's been found guilty by the National Labor Relations Board and chose not to appeal, or chose to acquiesce in the Board's decision.

They're only concerned with the number of times that the defendant or that the employer's appealed various decisions of the National Labor Relations Board or refused to acquiesce in Board decisions which employers believe in good faith to be wrong.

In each of the cases before you under which [23]Gould was cited, Your Honor, one was a certification, election. The only way the appeal, the only way the decision could be chal-

lenged -- The other involved a sympathy strike where Gould in good faith believed that its contract with the union specifically forbade that very type of strike.

The other case, one of the other cases taken up on appeal was taken up on appeal to determine whether or not the unfair labor practices alleged in that particular charge were covered by another proceeding which was not appealed.

So each of these challenges by Gould dealt with issues of federal law and which needed interpretation by the federal courts.

And, finally, Your Honor, I would like to point out that the last case, or the first case for which Gould was cited, Gould won part of the award on appeal. In other words, Gould took the action and the Court of Appeals agreed that the

National Labor Relations Board was wrong, at least in one instance.

And without that type of review, the National Labor Relations Board can make decisions which employers will not challenge. There will be instances in very good cases where employers will simply be afraid to challenge the decision because it will affect them [24]in their business, and in this case elsewhere in divisions totally unrelated to the unfair labor practices.

THE COURT: Mr. Peterson, are you aware of any other states that have similar laws?

MR. PETERSON: Connecticut, it's my understanding, has a similar statute.

THE COURT: Fairly new?

MR. PETERSON: I believe they were adopted at about the same time. I believe both of these statutes came about

after Congress specifically rejected such a remedy or punishment in the 1978 Labor Reform Bill.

Congress considered and said, no, we will not allow the National Labor Relations Board or federal agencies to debar contractors from doing business with the federal government solely because they have been found guilty of violating the National Labor Relations Act, pointing out that the purpose of the National Labor Relations Act is remedial.

And the State here is discriminating against Gould and other employers similarly situated solely because it has appealed various decisions or has refused to acquiesce in decisions of the National Labor Relations Board in the manner Congress mandated.

Now defendants will, no doubt, argue that they have the right as any pur-

chasers to buy from whomever [25]or wherever they please and refuse to purchase from anyone for any reason or no reason.

Well, as Your Honor I am sure is quite familiar, the law of employee contract's terminable at will. It is well established that, yes, you may do it for any reason or no reason, but not for a reason violative of the law.

Here, the very reason given by the defendants for refusing to do business with Gould is unconstitutional.

THE COURT: I'm not so sure the State is in that position, anyway.

I suspect that they're bound by law to do their purchasing in a manner that's not arbitrary and not capricious and that is fair to everybody concerned.

But, anyway, your point is -- I understand your point and it's not necessary to follow that any further.

MR. PETERSON: Finally, Your Honor, defendants finally argue that they're not hurting the right to appeal because they don't penalize the victorious appealers, which is true. If you win, you don't get penalized; but if you don't take the risk, you never know.

THE COURT: Right. I think that's the whole point of all of the decisions on that issue. We're not talking about the winners, but what happens to the [26]losers. And a person who wins doesn't obviously, have the concern of the death penalty or double rent forfeiture or anything else.

And I see that as not too strong an argument on behalf of the defendants.

MR. PETERSON: Your Honor, is there anything else, any other points that you would like for me to cover?

THE COURT: Perhaps not right now; and perhaps I will later after I have heard from Mr. Rice.

MR. PETERSON: In that case, thank you for listening, Your Honor.

THE COURT: Thank you.

Mr. Rice.

MR. DAVID RICE: May it please the Court: I start with an understanding based on your questions of counsel that you are certainly familiar with the briefs and with the issues involved in the proceeding. And I don't think it behooves me to reiterate all that which is contained in our briefs.

I would like to start, however, with a point that struck me as advancing a

proposition in order to prove an argument when the proposition isn't justified.

And there are basically three arguments that were advanced by counsel and which you discussed [27]with counsel. One has to do with whether the two state laws here involved are preempted because they purport to regulate conduct that's subject to regulation by the federal government.

The second is whether those laws, even if they don't purport to regulate that conduct, nonetheless, are unconstitutional and adversely affect a right given under federal law to pursue a right under federal law.

And the third argument is that in any event the laws are unconstitutional because they create a classification which is not rationally based and does not satisfy the equal protection test.

I intend not to address in greater detail the last section, the last argument, because I think that's really a question of the wisdom of the legislature.

And while I personally have some reservations about that, as do some of my clients, the Wisconsin legislature has passed it. We are bound as an agency and as the Attorney General of the State to uphold the constitutiionality [sic], if we can.

THE COURT: I agree.

MR. DAVID RICE: I want to turn in reverse to the second issue, do we burden a constitutional right.

[28]And when counsel began his remarks he told the court that the company had been advised by the State that because the company had sought to appeal decisions under the National Labor

Relations Act, the company was being denied the right to bid on contracts for the State of Wisconsin and to receive those contracts.

Unfortunately, that's not the case. That's not true. The statute doesn't authorize that, nor has the State taken that position.

You have to look at the state statute. And if you look at Section 101.245, what is says is that the state--basically it says the state won't do business with persons or firms who are found to have violated the National Labor Relations Act, both by the Board and by three federal appellate courts, within a five-year period.

So the important point is that there must be three final decisions of the federal appellate courts.

Well, there are more than one way for a case to get to the federal appellate courts. When I read the draft of our brief, which I didn't author, I was also struck by the fact that the first argument contained there was the one who victoriously appeals would not be subject to the law; and I thought, boy, that was a pretty weak argument. So I discussed it with the author [29]of the brief and we added the next paragraph.

And I think the paragraph on Page 8 and 9 of our brief is an important paragraph because what it shows is that you can have a final decision of an appellate federal court which will result in the application of the state statute involved here where the employer doesn't appeal at all.

And in fact that's what happened in one of the four cases here. If the NLRB

makes the decision and it's adverse to an employer, the employer can sit back and do nothing. But the federal government, the National Labor Relations Board, can take the employer to federal court and can enforce its order and can obtain a favorable decision.

And in fact one of the federal decisions upon which the State relies here was one in which there was no appeal nor cross appeal by the company but was clearly an enforcement action brought by the NRLB [sic].

THE COURT: But is that really different? I mean, as I look at it, there are two possibilities. The NRLB [sic] says, Company, you're in violation. And the two possibilities are the company says, okay, we think they're wrong. We're not going to do anything

about making an award of back pay, let them sue us.

That, unless you're counting on the limited [30]resources of the Department of Labor and the NLRB and everybody else, which is, you know, not -- I mean, that's something to count on that they won't get around to suing you and they'll be too busy suing other people; or you must appeal yourself because you think the NLRB is just plain wrong.

I don't really see that those are two options. It seems to me that unless you can assume with great reason that you'll never be sued for not complying with an order of the Board, the fact is you're either going to be sued or you're going to have to sue in order to get this finally determined as to whether you or the NRLB [sic] is correct. And I just --

MR. DAVID RICE: Well, maybe I am making the argument --

THE COURT: And I guess you're saying that the person's desire to appeal can't be said to be chilled because the person doesn't even have to appeal. The whole matter can get to court without his exercising that right to appeal. But I really have trouble seeing that.

MR. DAVID RICE: I think I'm responding more precisely and maybe I am not stating it as I should have.

But I am responding to the argument made that there is a classification here and that the statute [31]penalizes those persons who do appeal, but those persons who do not appeal can violate with impunity the federal statute as many times as they would like without fear of ever being subject to the state law.

And that is the point I think I am trying to make that it simply is not true. That if you violate many times and you choose not to appeal, you still are subject to the Board coming in and getting a federal decision which would affect your right to have a contract.

THE COURT: Oh, I see what you say. But that goes to the equal protection argument that we decided wasn't too terrific anyway.

MR. DAVID RICE: I guess that's right. I guess that's right. I think either way you reason it out I am not convinced that it affects --

THE COURT: Can we go back to the statute, because in looking at it again I was struck by something and I want to ask you how you understand the wording of the statute.

In Paragraph 1 of Section 101.245 it says: "if the three final decisions involved a cumulative finding of at least three separate violations of persons and firms that have been found to be in contempt of court for failure to correct the violation of the National Labor Relations Act on three or more occasions."

[32]Now what I want to know is does that mean that an employer gets an adverse decision from the NLRB and either continues to violate or appeals, has his case heard in the Court of Appeals and gets an adverse decision from the Court of Appeals, and violates the law after getting the adverse decision from the Court of Appeals, and then is found in contempt of the Court of Appeals?

MR. DAVID RICE: The answer is no.

THE COURT: Okay.

MR. DAVID RICE: The statute's not a model.

THE COURT: It's really in violation of a Board order rather than contempt of court.

MR. DAVID RICE: Yeah. I think you have to read the statute. And if the Court will read with me Instruction 1: that the list shall be, and here's the preposition that's important, of persons or firms starting there, a list of persons or firms who have been found by the National Labor Relations Board and by three different final decisions of a federal court within a five-year period.

As determined under (1) if the three final decisions involved a cumulative finding of at least three separate violations to have violated the National Labor Relations Act, and then there is a cite and then there is a comma and then

it says, and of persons or firms. [33]And I think that means you relate back to the list in the second line.

THE COURT: So they're talking about two?

MR. DAVID RICE: And a list of persons who have engaged in contemptuous conduct. So it's separate.

THE COURT: Oh, okay. All right.

MR. DAVID RICE: There are some problems, though, with the construction of this statute, some problems that were raised by the company before the State agency, as to the propriety of its being placed on the list.

Questions about whether there have to be three NRLB [sic] decisions and three judicial decisions all within the five-year period of not [sic]. And there is some ambiguity here.

But it seems to me, if it is to be resolved, that is a question for the state courts and not for the federal court.

Did I answer your question?

THE COURT: Um-hum. Thank you.

What is your response to this argument that in precluding a labor law violator from winning a state bid, the State is adding an additional penalty to a scheme that is otherwise complete, and that when it tries to do that, it is in violation of the NLRA and [34]the Supremacy Clause?

MR. DAVID RICE: Well, I think that's just a question of perspective. It's like the three blind people looking at the elephant. I think it's a question of how you view it.

I think that we view it as not as a regulatory statute, not as an additional

penalty, but merely as an exercise of State's right to determine with whom it is going to contract.

THE COURT: How can you say that? I guess I just don't follow that.

I have trouble seeing why it's not another penalty. It seems to me to be closed out of a market is a pretty big deal. If you said that people whose company started with the initial "J" couldn't obtain contracts in the State of Wisconsin, I think that would not be legal.

I mean, I don't think the State is completely free to contract with anyone it wants to or to exclude anyone it wants to from the bidding. I think there has to be rules and regulations that it follows.

Now XYZ Corporation out there on State Street, privately owned, can buy

from anybody it wants to, and it can be as arbitrary or capricious as it wants to be; but I don't think the State can just say, well, on [35]this bid for ball point pens for DOA, we're only going to buy from companies that are located in town south of Waunakee or something like that, unless there is some sort of valid reason for doing that. But everybody who is north of Waunakee could argue that they're being penalized for the location of their business.

MR. DAVID RICE: Well, I'll respond to it in two ways. First of all, as I said before, I don't think it is perceived as a penalty. We may disagree about that.

THE COURT: By the contractor it's perceived that way.

MR. DAVID RICE: But I don't see it as a penalty for having violated the act;

and I understand that perhaps you see it that way.

Then the question is, under the Federal Preemption Law, and under the National Preemption Law, is there congressional intent to preempt the State even where a state's conduct does affect labor-related conduct.

There are certain exemptions, certain exclusions, one which is in the area where the conduct is a peripheral matter either to the concerns of the federal law or touches on interests which are deeply rooted in local affairs.

The Reeves case cited in our brief stands [36]for the long-standing proposition that states do have a right to participate in the marketplace as do private employers. That long-standing and recognized right in this particular context in the question you have raised

it could give it an exemption from federal preemption because it is a peripheral matter and because it does affect something that's of concern to the states.

THE COURT: Well, let's go back. I understand your point that even if it is a penalty, it's peripheral. But let's talk about whether or not it's a penalty because if you had some persuasive argument on that point, I would like to hear it.

I just have trouble seeing it as anything but a penalty. And if I'm missing something, I'd like some help because I don't see how you can characterize it in any other way.

MR. DAVID RICE: It has the effect of penalizing the employer. I am not going to stand here and tell you that I disagree with that.

THE COURT: Okay. So then we move on to the question, it is a penalty. But the effect upon the NLRB is so minimal or so peripheral that it can't be said to interfere with the purposes of that act. And, therefore, it is not considered to be preempted.

MR. DAVID RICE: Well, that's the basic [37]sort of preemption, of course, is whether there is interference. And, yes, we say there wouldn't be such interference as the law is developed. That is a case of first impression, at least in the research that I have been able to do.

None of the preemption cases that I have looked at, they have been cited in both parties' briefs, even approach this kind of a case. Most of them, as you said earlier, have to do with what kind of regulation was the underlying

conduct. The deflammatory conduct is the race discriminatory conduct, picketing violence, whatever. We don't really have that here, except to the extent, and maybe this is where I get back to the penalty and view it somewhat differently, it seems to me it penalizes the conduct. But it is almost after the fact. I can't make a clear distinction here for you. I am not able to express it.

Maybe it's just that it's so removed from the adjudicatory process under which the federal agency and the federal court first determines the violation that in the exercise of its contracting right the State is so far removed that it's not a penalty. I don't know how to state that other than as I have.

THE COURT: Well, certainly, the employer has an adequate opportunity to

be heard. I mean, there's [38]no violation of due process in the determination of the factual inquiry did the employer or did the employer not violate the act. That's certainly not at issue.

In that Machinists case, I didn't write down the name of the defendant --

MR. DAVID RICE: That was the State, too.

THE COURT: That's right. Wisconsin. The United State Supreme Court talked about preemption in two categories of cases. The first is those that reflect a concern that one form would enjoin as illegal conduct which the other form would find legal. We're not talking about that.

The second is those that reflect concern that the application of state law by state courts would restrict the

exercise of the rights guaranteed by the federal act.

Now they were talking, and I think most of us would see that in terms of rights to negotiate, rights to picket, rights to strike, rights to lock out, whatever, all of those things that are ongoing in the general relationship between employers and employees over their ability to negotiate their differences under the law. And the Court was not concerned in that case, obviously, with the exercise of appellate rights.

But I'm not sure that that quotation [39]would exclude the exercise of appellate rights. And that is one of the rights as guaranteed under the NLRA while the Court didn't say it there, there is this question which Mr. Peterson has raised, and I think it's a very valid

argument, and that is promoting the purposes and goals of the act through remedial measures rather than punitive measures is the manner that Congress has chosen to go.

And adding on this punishment by the State does seem to be a determination by the State of Wisconsin that regardless of the way Congress wants to attack this problem, we, the State, want to attack it by keeping these people out of the market and keeping them from competing with our supposedly non-violating companies.

I understand that the State can say things like, well, you can picket and we can't interfere with your right to picket, but we can interfere with your hitting each other over the head with your picket signs because we have an interest in the safety and peace keeping of our community.

And they can say, you can walk around with your picket signs, but you can't barricade the door to the Police Department because the police need to get out, or things like that, because there are overriding interests in safety and peace and all of those matters that make [40]it possible for the State to make it important for the State to be able to regulate conduct for those ends. And they can do it as long as it's very narrowly defined and just focused on the behavior that the State is impowered [sic] to protect.

But here the concern of the State is the State concern that the federal government has. What is it that is going to keep people from violating the laws against mistreatment of employees? We think that not letting them contract is

one thing that's going to keep them from violating in the future.

MR. DAVID RICE: That's viewing it as a regulatory statute and that that's the purpose which derives to the legislature.

Another purpose would be, we don't care who violates. We realize we're preempted and we can't regulate the conduct. We simply don't want to expand our funds to persons who have been determined to have violated the law. We don't seek to deter. We just seek not to maybe recognize or somehow spend the State's money in doing business in that way.

To answer, I don't think you addressed the specific question on Machinists. I don't think Machinists ever contemplated this situation either any more than any other preemption cases

have. We are [41]struggling with that language.

The rights under the National Labor Relations Act that were to be left alone by the states in Machinists, in my view, were the rights to essentially engage in economic combat to further your interests, and that even if the state regulation would otherwise not be preempted because federal law would not grant a right or prohibiting something, nonetheless, the State couldn't interfere because it would affect the parties, essentially their economic positions.

There are two cases subsequent to Machinists that raise that question in a pretty difficult context. They are the unemployment compensation cases. And there the courts struggle and reach a result, but it's not terribly compelling in terms of if you grant unenployment

compensation to strikers, are you penalizing the employer or are you aiding the employees? The courts have been pretty lenient in allowing states leeway in those cases.

But I think that the employers in those cases certainly had a good argument that the State, in granting unemployment benefits or denying them, was having impact, perhaps violative. Machinists rationale. But I don't think Machinists was --

THE COURT: Well, they weren't restricting. [42]Perhaps that's the difference. Although the Ohio case really didn't talk about the NLRA.

Well, you're right. I think those were tough cases. I thing it would have been easy to go the other way, perhaps. But I'm sure they really shed much light on what's happening here.

MR. DAVID RICE: I agree.

THE COURT: And I think a distinction that could be made is that there is this other concern of the State and that is what it's going to do with its unemployment fund and how it's going to do the fairest job of distributing a limited amount of money for the well-being of unemployed people.

Now I suppose you can argue that the State has a finite amount of money to do contracting and it should decide how it's going to spend its money; but that doesn't get us very far because Gould may be the low bidder by a high percentage and it may be that the State is actually costing itself money by not purchasing from Gould.

MR. DAVID RICE: This statute, unfortunately, does not enjoy the additional benefits of rational argument

that were made in Ohio, I don't think. I think it has a pretty single-minded purpose.

I'm not sure I agree that it's to deter [43]labor law violators, but it clearly is to put the State in the position of not doing business with them. I think based on everything --

THE COURT: But that has a time limit.

MR. DAVID RICE: There's a three-year time limit, right.

THE COURT: So, presumably, they're hoping that the behavior will change so that they're not shutting the door on the behavior changing so that eventually they can contract with those people in the future.

MR. DAVID RICE: Well, that's true. But any immediate change in behavior doesn't make any difference

because it's a three-year duration and it doesn't matter what the company does in the interim.

THE COURT: That may be just long enough to make sure that it's a sincere change in behavior.

MR. DAVID RICE: I think unless the Court has other questions, the two things that I would observe from all the arguments that we've had is the Court's going to have to come to a decision on whether there is a sufficiently direct interference with federal rights, either by regulating conduct or attempting to regulate conduct, or interfering with procedural rights granted under federal law to justify a finding of unconstitutionality.

[44]In that respect I would just note that the courts have said, and you notice that I did not say because the

statute does not expressly apply to certain kind of conduct that there is no preemption.

But in those cases where the laws are more general and are not directed at the underlying conduct, I think it's harder to find preemption. That's one of the things that they said in the New York Unemployment Compensation case.

But the bottom line is whether or not the State interest is one that unduly interferes with the federal regulatory scheme in the constitutional sense. I leave that to your decision.

I guess I should just add that we recognize, as the Attorney General's Office of Wisconsin and as the named agency defendants here, that this statute does raise difficult constitutional questions. And we don't take them

lightly; and I don't mean by my last comment to suggest that.

I think it's a close question. I don't think there's any law that's been offered by counsel for the company, nor by us, that's conclusive on that question. And it's a question of extending prior precedents and applying them in this particular context to arrive at a result. And I don't mean any disrespect. I think it is [45]a difficult question.

THE COURT: Well, I didn't take it as meaning any disrespect. I took it as sympathetic. I hope that's all that was meant. Thank you.

Mr. Peterson, do you wish to add anything?

MR. PETERSON: Your Honor, at this time I would like to introduce Mr. Columbus R. Gangemi, who also works at

Winston & Strawn; and he will be handling our rebuttal.

THE COURT: All right. Mr. Gangemi.

MR. GANGEMI: Yes, Your Honor. And with your permission I would like to respond.

I'm sorry for this irregularity. I was a little late getting up here and Mr. Peterson kind of took over for me.

We have very little to add, except I would like to direct Your Honor's attention to one of the cases cited in our brief, specifically the case of In Re: Charles Sewell, which I believe is a recent decision of the Fourth Circuit, which I feel is very much on point in this case.

In this case we had a slightly different --

THE COURT: You don't have a copy of that?

MR. GANGEMI: Yes, I do, Your Honor. I do not have an official report of it, but I do have it [46]from the Daily Labor Reporter.

THE COURT: Oh, good. I'm not sure that would be in the advance sheets yet.

MR. GANGEMI: The slip opinion number we have cited in the brief, but we weren't able to get a copy of the slip opinion itself.

May I approach the bench, Your Honor?

THE COURT: Just give it to the Clerk. Thank you.

Mr. Rice, do you have a copy of that?

MR. DAVID RICE: No, I don't.

MR. GANGEMI: I have one for him, Your Honor.

MR. DAVID RICE: Thank you.

MR. GANGEMI: In this case, Your Honor, a union brought in state court an action for tortious interference with contractual relations against a president of a company which had ordered his company not to recognize a union following an election.

The action was removed to the federal court. And the district court judge held that indeed the union could bring such a state court action against the president of the employer for ordering his company not to recognize the union.

The Court of Appeals held that such a [47]state court action was preempted because it interferred with the right of the NLRB and of the federal court to determine whether or not an employer's refusal to recognize a union was or was not an unfair labor practice.

The reasoning of the court is very much on point here, directing Your Honor's attention to the second page of the slip opinion, second column toward the bottom.

I'm quoting from it: "Our review of the Board orders will be encumbered if company officials are required to defend themselves against state tort claims because of their decision to challenge Board certification in this court. A threat of liability for taking steps necessary for appellate consideration of Board orders inevitably will deter petitions for review. Preservation of our jurisdiction to enforce Board orders, therefore, justifies resort to mandamus for resolution of the claim of federal law has preempted state law, et cetera."

The point is this, Your Honor. As in this case, the Wisconsin statute at

issue will interfere with an employer's right to take an appeal to the federal courts of a decision by the NLRB because before he makes that decision to appeal, he must consider the possibility of being debarred from contracts with the State of Wisconsin or the State of Connecticut. It's not a [48]peripheral interference with a federal right. It is a very direct and a very immediate interference with what has to be the most fundamental of federal rights, the right to appeal to the judiciary for relief from an action of an agency.

I've practiced labor law now for 10 or 11 years. There are no regulations under the National Labor Relations Act. It is a well-established doctrine of federal policy that the National Labor Relations Law is developed on a case-by-case basis.

The National Labor Relations Board itself has repeatedly refused to issue regulations concerning the substance of the law that it enforces.

And the reason it does that is because it prefers the case-by-case adjudication. And, likewise, the federal courts and federal labor policy is a result of individual decisions developed on a case-by-case basis.

If we are to have a state like the State of Wisconsin decide that if you exercise that right to go on appeal to a federal court to review the decisions in the National Labor Relations Board, what you have is the state interfering very substantially, I think, with federal labor policy developing in that way.

Now it's true that only the State of [49]Wisconsin and the State of Connecticut thus far have taken this

approach. But if we could stop for a moment and consider what would happen if other states do this also, very substantial and difficult decisions would have to be made by an employer before they would ever make a determination that they would go on appeal.

Mr. Rice has suggested that there is no interference with the federal right because the decision to appeal has already been made and there's been a determination and a final decision. But in point of fact, Your Honor, what we're talking about is future decisions and future choices as to whether or not to reach an appeal.

So we would submit to you that the case of Sewell that I have given you a copy of is directly on point. And we think on the basis of that case and Garmon and the other cases cited to you

by Mr. Peterson, that you should hold the statute to be unconstitutional and to provide us with the Preliminary Injunction that we seek.

THE COURT: Thank you.

Mr. Rice, would you like to add anything?

MR. DAVID RICE: No, Your Honor.

THE COURT: I am prepared to rule. I will start by adopting, without repeating, all of the facts proposed by the plaintiff in its submission filed February [50]15th, 1983, which I understand defendants take no exception to.

I also find as fact that there are presently in the State of Wisconsin bidding opportunities for the plaintiff for contracts with the State of Wisconsin which plaintiff will be unable to take advantage of unless it prevails in this action.

I find that plaintiff has a reasonable probability of success on the ultimate merits of this case, that is, in establishing that Wisconsin Statute Section 101.245 is unconstitutional because it is in violation of the Supremacy Clause of the United States in two respects.

First of all, that the exclusion from bidding which applies to companies that have been the subject of three separate violations of the NLRA that have been adjudicated, does restrict companies in the exercise of rights guaranteed by the federal act, that is, the right to appeal from an adverse decision of the National Labor Relations Board.

Secondly, that the state law adds a penalty to conduct that is the subject of the National Labor Relations Act, conduct that Congress has decided should be dealt

with on a remedial basis; that Congress has had the opportunity to impose penalties in the form [51]of debarment from federal contracting and has declined to enact such penalties and that is reiterated in that respect, if not expressly, the concept that the scheme envisioned under the NLRA is a remedial scheme designed to encourage, sometimes vigorously encourage employers to comply with the NLRA, and has decided that the best way to obtain compliance is through this scheme that it has enacted which encourages employers to comply rather than penalizing them for past acts of noncompliance.

There is a full regulatory scheme under the NLRA which can deal with violations of the NLRB rulings and violations of court adjudications. The efforts of the State of Wisconsin to add

a penalty interfere and impinges upon the scheme that Congress has developed over the years.

Taking up the second aspect of a Preliminary Injunction, I believe that the threatened injury to the plaintiff, that is, the inability to bid on any state contracts, outweighs the harm to the defendant in not being able to enforce the Wisconsin statute.

I think it's clear that the plaintiff has no adequate remedy at law and that it will be harmed if the injunction does not issue.

Although the contracts that we're talking [52]about are contracts that can be recompensed by an award of damages, that is no way to get an award of damages from the defendants in this case; and so the usual standard in any harm that can be recompensed in money does not apply in

this particular action against the State of Wisconsin and its agencies and officers.

I conclude, also, that the granting of a Preliminary Injunction does not serve the public interest and that is, of course, tied up with the original ruling that the planitiff [sic] has a likelihood of ultimate success.

I believe that the public interest in peaceful labor relations is served by the National Labor Relations Act, and that any interference with the working of that scheme would not serve the public interest; and I conclude that this is an interference with the working of that scheme.

Defendants raised one other point which we did not focus on in the argument and that is the question of whether or not the Department of Industry, Labor and

Human Relations and the Department of Administration and various bureaus that were named in the caption of the Complaint may be properly sued in a case seeking money damages, injunctive and declaratory relief.

There is a very good question about the propriety of those defendants being named in this lawsuit; [53]but since there are individual defendants named who can be sued for injunctive relief, I don't think that it is a problem that affects the Court's jurisdiction or the decision on the merits of the Motion for Preliminary Injunction.

Mr. Peterson, I would ask that you submit to me before the end of the day today an order for my signature simply encompassing the essence of the ruling;

not any of the findings of fact or conclusions, but simply the order granting the Preliminary Injunction.

Mr. Rice, is there anything further in this matter that you want to take up?

MR. DAVID RICE: No.

THE COURT: Okay.

Mr. Peterson, anything else?

MR. PETERSON: No, Your Honor.

Thank you very much.

THE COURT: All right. Court will adjourn.

* * *

(Whereupon, said proceedings in the above-entitled civil action were concluded at 3:23 o'clock p.m.)